

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

FILED BY CLERK

DEC 13 2007

COURT OF APPEALS  
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	
Respondent,	)	2 CA-CR 2007-0220-PR
	)	DEPARTMENT A
v.	)	
	)	<u>MEMORANDUM DECISION</u>
	)	Not for Publication
JOSE ARMANDO VARGAS,	)	Rule 111, Rules of
	)	the Supreme Court
Petitioner.	)	
_____	)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20041621

Honorable Stephen C. Villarreal, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney  
By Jacob R. Lines

Tucson  
Attorneys for Respondent

DiCampli, Elsberry & Hunley, L.L.C.  
By Anne Elsberry

Tucson  
Attorneys for Petitioner

HOWARD, Presiding Judge.

¶1 Jose Armando Vargas challenges the trial court’s denial of his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. Although we accept review, we deny relief.

¶2 Vargas was charged with aggravated driving under the influence of an intoxicant and aggravated driving with an alcohol concentration (AC) of .08 or more, both while his license was suspended, revoked, or in violation of a restriction. The trial court instructed the jury on the lesser included offenses of driving under the influence of intoxicating liquor and driving with an AC of .08 or more. The jury found Vargas guilty of the lesser included offense on the first count, but guilty of the charged offense in count two. Following a bench trial on the state’s allegation that Vargas had an historical prior felony conviction, the trial court sentenced Vargas to time served on count one and an enhanced, presumptive, 4.5-year term of imprisonment on count two. This court affirmed Vargas’s convictions and sentences on appeal. *State v. Vargas*, No. 2 CA-CR 2005-0097 (memorandum decision filed May 24, 2006).

¶3 Vargas filed a petition for post-conviction relief claiming trial counsel had been ineffective by failing to file a motion for a new trial based on the jury’s “clear[ly]” inconsistent verdicts. Vargas also argued that an evidentiary hearing was necessary to determine whether the alleged prior conviction had been properly proven. The trial court summarily dismissed the petition, finding Vargas had presented no “material issue of fact or law that might entitle [him] to relief under Rule 32.”

¶4 In his petition for review, Vargas does not raise any issue relating to his prior conviction.<sup>1</sup> Instead, he argues that the trial court erred by “fail[ing] to grant an evidentiary hearing to determine whether trial counsel was ineffective when he failed to request a new trial . . . and thereby challenge the sufficiency of the evidence.” He contends that, because the jury found him guilty of the lesser included offense in count one, the jury must have found insufficient evidence that he had been driving while his license was suspended, revoked, or in violation of a restriction. He argues that “if the jury could not find sufficient evidence regarding the driver’s license on the first charge, they would not have had sufficient evidence on the second charge.”

¶5 “[W]e review a trial court’s denial of post-conviction relief for an abuse of discretion.” *State v. Decenzo*, 199 Ariz. 355, ¶ 2, 18 P.3d 149, 150 (App. 2001). We find none here. “To avoid summary dismissal and achieve an evidentiary hearing on a post-conviction claim of ineffective assistance of counsel, Defendant must present a colorable claim (1) that counsel’s representation was unreasonable or deficient under the circumstances and (2) that he was prejudiced by counsel’s deficient performance.” *State v. Fillmore*, 187 Ariz. 174, 180, 927 P.2d 1303, 1309 (App. 1996); *see also Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); Ariz. R. Crim. P. 32.6, 32.8. We will affirm a trial court’s order summarily denying relief if a defendant fails to raise a

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<sup>1</sup>On direct appeal, Vargas had challenged the sufficiency of the evidence to support the court’s finding that he had a prior felony conviction. The issue was, therefore, precluded under Rule 32.2(a).

colorable claim on either of these two points. *See State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985). A colorable claim of post-conviction relief is “one that, if the allegations are true, might have changed the outcome.” *State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993).

¶6 Vargas did not present a colorable claim either that trial counsel’s performance had been deficient or that he was prejudiced thereby because Arizona law permits inconsistent verdicts. *See State v. Zakhar*, 105 Ariz. 31, 32, 459 P.2d 83, 84 (1969).

““The most that can be said [of cases with inconsistent verdicts] is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant’s guilt. We interpret the acquittal as no more than their assumption of a power which they had no right to exercise, but to which they were disposed through lenity.””

*Id.*, quoting *Dunn v. United States*, 284 U.S. 390, 393, 52 S. Ct. 189, 190 (1932), quoting *Steckler v. United States*, 7 F.2d 59, 60 (2d Cir. 1925); see also *United States v. Powell*, 469 U.S. 57, 65-66, 69, 105 S. Ct. 471, 477, 479 (1984) (approving holding in *Dunn* and determining “possibility that the inconsistent verdicts may favor the criminal defendant as well as the Government militates against review of such convictions at the defendant’s behest” and finding “unworkable, a rule that would allow criminal defendants to challenge inconsistent verdicts on the ground that in their case the verdict was not the product of lenity, but of some error that worked against them”).

¶7 To the extent Vargas is attempting to challenge the sufficiency of the evidence to support the jury’s verdict on count two, he is precluded from doing so under Rule 32.2(a)(1), as the issue was “[r]aisable on direct appeal.” Because Vargas failed to show “a material issue of fact or law which would entitle [him] to relief” under Rule 32, and because “no purpose would [have been] served by any further proceedings,” the trial court acted within its discretion in summarily dismissing Vargas’s petition. Rule 32.6(c).

¶8 Although we grant review, we deny relief.

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JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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J. WILLIAM BRAMMER, JR., Judge